The Millcraft Paper Company *and* Truck Drivers Union, Local No. 407, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 8-CA-16443

18 May 1984

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

DECISION AND ORDER

On 16 December 1983 Administrative Law Judge Irwin H. Socoloff issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. On a charge filed on January 26, 1983, by Truck Drivers Union Local No. 407, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein referred to as the Union, against The Millcraft Paper Company (Respondent), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 8, issued a complaint dated March 17, 1983,[1] alleging violations by Respondent of Section 8(a)(5), (3), and (1) and Section 2(6) and (7) of the National Labor Relations Act (the Act). Respondent, by its answer, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Cleveland, Ohio, on June 20 and 21, 1983, at which the General Counsel and Respondent were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

On the entire record in this case, and from my observations of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is an Ohio corporation engaged in the business of warehousing and selling paper products at its Cleveland, Ohio facility. Annually, in the course and conduct of its business operations, Respondent ships goods valued in excess of $50,000 directly to points located outside the State of Ohio. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Respondent employs some 12 warehouse employees who are represented by the Union's sister local, Teamsters Local No. 507. Prior to 1974, Millcraft also owned its own trucks and employed four truckdrivers to deliver paper products to its customers. Those drivers were represented by the Union and covered by a collective-bargaining agreement between Millcraft and Local 407.

In 1974, Respondent contracted with Leaseway of Ohio, Inc., to perform the delivery services theretofore handled by Respondent's own drivers. Leaseway purchased Millcraft's trucks and hired the Millcraft drivers. It then serviced the Millcraft account, utilizing, essentially, the same trucks and drivers previously assigned to that task by Millcraft. The Union, which also represented the Leaseway drivers, continued its representation of the former Millcraft truckdrivers, as part of the Leaseway unit.

Respondent decided, in 1982, for economic reasons, to terminate its contract with Leaseway and to utilize the services of another carrier at substantial cost savings. As a result of Millcraft's action, Leaseway discharged the drivers assigned to service the Millcraft account, effective January 19, 1983. Leaseway so notified the Union. Thereafter, the Union demanded that Millcraft bargain with it concerning the status of the discharged drivers. Respondent refused, advising the Union that the effected drivers were Leaseway employees and did not work for Millcraft. In the instant case, the General Counsel contends that Millcraft was a joint employer of the drivers and, by its failure to notify and bargain with their collective-bargaining representative concerning the decision to terminate the contract with Leaseway, and the effects thereof, violated Section 8(a)(5), (3), and (1) of the Act.

B. *Facts*[2]

Until 1974, Millcraft owned and operated four trucks, bearing the Millcraft logo, which were used to deliver its

[1] The complaint was initially issued against Respondent and Leaseway of Ohio, Inc., as joint employers. However, on June 14, 1983, the Regional Director approved the Charging Party's request that its charges filed against Leaseway be withdrawn. At trial, the complaint was amended to allege that Respondent, as joint employer with Leaseway of Ohio, Inc., had violated the Act.

[2] The factfindings contained herein are based on a composite of documentary and testimonial evidence introduced at trial. The record is generally free of significant evidentiary conflict.

paper products to customers in the greater Cleveland, Ohio area. The trucks were kept at the Millcraft warehouse and were loaded each night by Respondent's warehouse employees. Loading was performed pursuant to the instructions of the drivers who, on returning to the warehouse each night, following completion of the day's deliveries, sorted out the customer invoices of goods for delivery on the next day. The drivers decided on the order of those deliveries and instructed the warehouse employees to load the trucks so as to facilitate the desired sequence of delivery stops.

Each of the drivers serviced established geographical routes. On reporting in the morning to the warehouse supervisor, they picked up the customer invoices that they had arranged on the night before and proceeded on their delivery routes. On occasion, a driver was instructed by the warehouse supervisor to make a rush delivery to a particular customer outside the order previously arranged by the driver. This was referred to as a "hot one." While on their routes, drivers would not normally have contact with Millcraft officials, unless an emergency arose.

Under the 1974 agreement between Millcraft and Leaseway, the latter agreed to provide an exclusive delivery service to Millcraft, subject to the times, schedules, and destinations dictated by Millcraft. Leaseway purchased the four Millcraft trucks but, generally, used only three of them to service the Millcraft account. Those trucks were parked at the Millcraft warehouse so that they could be loaded, at night, by the warehouse employees. The fourth truck was kept on Leaseway premises. At the insistence of Millcraft, Leaseway hired the four Millcraft drivers and assigned three of them to the Millcraft account, while utilizing the fourth as a yard driver, that is, one not assigned to a particular customer account. Subsequently, another of Leaseway's yard drivers bumped one of the drivers assigned to service Millcraft. The latter, then, also became a Leaseway yard driver.

Leaseway added its own logo to the purchased trucks. It maintained and serviced the trucks and purchased insurance to cover them. Leaseway facilities were used to provide the trucks with gasoline.

The Leaseway-Millcraft agreement provided that the drivers "shall be considered employees" of Leaseway and "shall be subject to employment, discharge, discipline and controls solely and exclusively" by Leaseway. In practice, Leaseway paid the drivers; paid workers' compensation premiums which covered the drivers; paid unemployment compensation premiums for the drivers; made contractual health and welfare and pension contributions on behalf of the drivers; paid holiday and vacation pay to the drivers; and handled their grievances. Leaseway also disciplined the drivers, although, in doing so, it frequently relied on the factual reports of Millcraft officials. However, Millcraft officials did not attend Leaseway-Union grievance meetings and the views of Millcraft were not stated at such meetings. When a driver was sick, or otherwise could not report to work, he notified Leaseway, which then dispatched one of its yard drivers as a substitute. Yard drivers also substituted for vacationing regular drivers.[3]

During the term of the Leaseway-Millcraft arrangement, the drivers continued to service established routes, and to schedule themselves the order of deliveries, subject to the designation of a "hot one" by the Millcraft warehouse supervisor. While on their routes, drivers' contacts with officials of either Leaseway or Millcraft were infrequent. If a truck broke down, the driver would call Leaseway which would dispatch its tow truck and mechanic to fix the truck or, if necessary, make other arrangements for completion of deliveries. Either the driver or a Leaseway official would notify Millcraft that deliveries would be delayed.

Since the amount payable to Leaseway under the agreement was based on the actual hours worked by the drivers, the drivers were required to punch two timecards kept at the Millcraft facility. Millcraft retained one card to verify amounts charged by Leaseway and Leaseway used the other car in preparing its payroll. Millcraft had authority to ask the drivers to work overtime.

During the 9 years that Leaseway provided delivery service to Millcraft, Millcraft was not involved, directly or indirectly, in collective-bargaining negotiations with the Union. At all times, the terms and conditions of employment of the drivers were governed by Leaseway's contract with the Union and Millcraft made no suggestions or recommendations concerning contract terms. Similarly, Millcraft was never involved in grievance or arbitration proceedings.

The record evidence shows that Millcraft and Leaseway are separate, distinct, and unrelated entities. They do not share common ownership or common management, and their dealings with each other were at arm's length. As noted, in 1982, when Millcraft decided to terminate its contractual relationship with Leaseway effective January 1983,[4] it engaged another enterprise, at cost savings, to perform the delivery services which had been provided by Leaseway. Despite demand by the Union, Millcraft refused to negotiate concerning Leaseway's January 1983 action, laying off the drivers who had serviced the Millcraft account.

C. *Conclusions*

The General Counsel's contention that Millcraft had a duty to bargain with the Union concerning the decision to terminate its contract with Leaseway, and the effects thereof on the drivers, is premised on the view that Millcraft and Leaseway were joint employers of the drivers. Thus, the General Counsel urges that the two entities exercised common control of the employment relationship. However, in my view, the record evidence does not show control by Millcraft, during the 1974 to 1983 period, over essential terms and conditions of employment of the laid-off drivers. At most, it may be said that Millcraft gave some direction to the Leaseway employ-

[3] Vacation schedules were approved by Leaseway, to be taken at times convenient to the Millcraft customer.

[4] Pursuant to the Leaseway-Millcraft contract, the trucks were then repurchased by Millcraft.

ees, pursuant to performance of a service contract, but did not engage in actual supervision of significant work activities.

As shown in the statement of facts, Leaseway and Millcraft are unrelated entities without common ownership or management. The agreement they negotiated, providing for the performance of delivery services by Leaseway, specifically defined the drivers as Leaseway employees, subject to discharge, discipline, and control by Leaseway. Leaseway paid the drivers their wages and fringe benefits pursuant to its collective-bargaining contract with the Union; a contract which Leaseway alone negotiated. Leaseway disciplined the employees and handled their grievances. It maintained and serviced the trucks they drove.

It is true that, during the 1974 to 1983 period, the drivers had brief, but daily, contact with Millcraft. Such contact occurred when the drivers took their trucks in the morning and when they returned the trucks in the evening and picked up and sorted invoices of the next day's deliveries. However, the drivers spent the vast majority of their time servicing their routes and, while doing so, were generally not in contact with Millcraft. The employees worked established geographical areas and, for the most part, themselves determined the order of deliveries. While there were instances in which Millcraft complained to Leaseway about the performance of a particular driver, matters of discipline were handled entirely by Leaseway.

That the drivers had regular contacts of short duration with Millcraft and that they received incidental direction from Millcraft officials is insufficient to establish that Millcraft was an employer. I conclude, rather, based on the record evidence showing exclusive control by Leaseway of the essential elements of employment, that, during the 9-year period in which Leaseway performed delivery services for Millcraft, the drivers were exclusively employees of Leaseway.[5]

CONCLUSIONS OF LAW

1. Respondent The Millcraft Paper Company is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Truck Driver's Union, Local No. 407, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law, I issue the following recommended[6]

ORDER

The complaint is dismissed in its entirety.

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[5] *John Breuner Co.*, 248 NLRB 983 (1980). Cf. *American Air Filter Co.*, 258 NLRB 49 (1981).

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.